

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

FILED

November 14, 1996

Cecil W. Crowson
Appellate Court Clerk

FRANK COCKRILL,)	
)	
Plaintiff/Appellee,)	SMITH COUNTY
)	
VS.)	HON. C. K. SMITH
)	CHANCELLOR
JERSEY MINIERE ZINC, INC.)	
)	No. 01S01-9601-CH-00007
Defendant/Appellant.)	

FOR APPELLANTS:	FOR APPELLEE:
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MEMORANDUM OPINION

MEMBERS OF PANEL:

FRANK F. DROWOTA, III, JUSTICE
JOE C. LOSER, JR., SPECIAL JUDGE
CORNELIA A. CLARK, SPECIAL JUDGE

AFFIRMED	CLARK, SPECIAL JUDGE
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This worker's compensation appeal has been referred to the special worker's compensation appeals panel of the Supreme Court in accordance with Tenn. Code Ann. §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

In this appeal, the employer, Jersey Miniere Zinc ("Jersey"), contends that the trial court erred in finding claimant suffered any permanent partial disability from a job related injury. Jersey also contends that the trial court erred in (1) admitting the deposition of Dr. Richard Fishbein, (2) denying the employer the right to amend its answer to plead lack of notice, (3) excluding cross-examination of plaintiff on the issue of plaintiff's alleged drug problem and (4) refusing to allow a rebuttal witness to testify about the contents of a videotape showing plaintiff using his right hand and arm. Plaintiff-appellee has raised an additional issue concerning whether the trial court abused its discretion in permitting defense witnesses to testify when they were not previously disclosed to plaintiff in response to plaintiff's written discovery request. This panel concludes that the judgment of the trial court should be affirmed in all respects.

The claimant, Frank Cockrill, was born in 1957. He completed the ninth grade and has not received a G.E.D. His previous employment includes carpentry work, farming, stocking shelves at K-Mart, building grain bins, long-haul truck driving, sealing driveways and logging. He had prior carpal tunnel syndrome surgery on both arms in about 1984, which was non-work-related. He also broke his right arm several years prior to this injury.

Plaintiff was employed by Jersey for about five years prior to his injury. For one and one-half years prior to the date of injury he operated a large claw machine. That machine has a thirty-foot-long boom and requires the operator to sit in a compartment with a joystick on each side. The knob on the top of the right joystick stays in the palm of the operator's right hand continuously during the operator's

performance of his job duties. The right joystick operates the claw on the end of the boom, which pries down rocks after blasting. The joystick on the left side of the claw is used only about fifty (50%) percent of the time. The operation of the claw machine causes a constant up and down jarring motion, which in turn causes plaintiff's right hand to hit the joystick repeatedly. Plaintiff is right arm dominant.

In addition to this employment, plaintiff operated his own paint and body shop on a part-time basis for about two years prior to the injury.

In about November 1992 plaintiff began having problems with his right arm, including numbness and tingling in the fingers. On December 4, 1992, plaintiff worked the night shift, completing his shift at 1:30 a.m. Saturday morning. During that shift he again had problems with tingling and hurting in his arm. Over the weekend plaintiff's arm began swelling, and the numbness and pain got worse. By Monday morning plaintiff's hand was black and he had hardly any feeling in it. On that Monday, December 7, 1992, plaintiff reported to the mine and showed his injured arm to Charles Hayes and Blake Silkwood, defendant management representatives. Both conceded at trial that plaintiff's hand and fingers were discolored and swollen. However, when Hayes asked plaintiff if the injuries had happened at work, plaintiff initially responded that they had not. He made that response because the condition had actually manifested itself over the weekend at home.

Plaintiff initially saw Dr. Culpepper, his family doctor, on December 7. At that time plaintiff was not certain whether his injury was work related. Dr. Culpepper referred him to Dr. Paul Abbey, an orthopedic surgeon in Lebanon. Dr. Abbey saw plaintiff in his office and sent him to McFarland Hospital Emergency Room, where Dr. Abbey treated plaintiff. From there plaintiff was sent by ambulance to Vanderbilt University Medical Center.

Plaintiff was treated in the Vanderbilt Emergency Room by Dr. Thomas Naslund. He stayed overnight at Vanderbilt and was released on Tuesday, December 8, 1992. While at Vanderbilt plaintiff was also treated by Dr. Ben Johnson, Jr. of the Pain Control Center. While plaintiff was in the hospital his wife called James White, personnel manager for defendant, and informed him that plaintiff was being treated for a work-related injury.

Dr. Naslund and Dr. Abbey consulted by telephone about plaintiff's treatment. An arteriogram ordered by Dr. Naslund did not identify a blood clot, but did identify vasospasm in the arteries to plaintiff's fingers. Dr. Naslund performed a stellate ganglion block to improve circulation to plaintiff's fingers.

Plaintiff was taken off work from December 7, 1992 through December 21, 1992. He returned to full duty at that time.

Dr. Naslund saw plaintiff again in January 1993. After performing more tests he suspected a diagnosis of hypersensitivity angitis. On January 8, 1993, plaintiff filed a sickness and accident form indicating his injury was work related. He changed that form only after being advised by Carol Gann, personnel assistant, that his sickness and accident insurance policy would not pay for work-related injuries.

Plaintiff filed a new, unrelated workers' compensation report in early February. He was again off work for a period of time. Plaintiff's last work day at Jersey was February 25, 1993. The employer's first report of injury as to this claim was dated March 22, 1993.

Dr. Naslund saw plaintiff again in March 1993. At that time he referred plaintiff to Dr. Ben Johnson, Jr. at the Vanderbilt Pain Control Center. Dr. Johnson saw plaintiff in referral on March 18, 1993. Dr. Johnson performed a nerve block on plaintiff's right arm, which was successful only for two days. Dr. Johnson

disagreed with Dr. Naslund's diagnosis and ultimately concluded that cumulative microtrauma or a variant of reflex sympathetic dystrophy (RSD) was the most accurate diagnosis of plaintiff's problems.

Dr. Naslund ultimately agreed with the diagnosis of reflex sympathetic dystrophy. He declined to testify as to the causation of the RSD, but advised plaintiff to change his type of employment because of his symptoms.

Dr. Johnson continued to treat plaintiff and performed a series of nerve blocks on plaintiff's right arm. Each block reduced plaintiff's pain significantly, but only for a short period of time. On July 30, 1993, Dr. Johnson prescribed a TENS unit for plaintiff, which plaintiff continued to use through the time of trial.

Dr. Johnson last saw plaintiff on February 1, 1995, when he performed a radial, median, and ulnar nerve block. Dr. Johnson concluded that trauma or injury was the most likely cause of plaintiff's RSD condition, and that prior carpal tunnel surgery, a broken arm, and/or use of drugs were not likely causes. He testified specifically that the operation of the claw with the hand on the ball of the joystick "would probably contribute" to plaintiff's type of injury. Dr. Johnson did not attempt to perform a permanent impairment evaluation pursuant to AMA Guidelines.

At the request of his attorney, plaintiff was seen by Dr. Richard Fishbein, an orthopedic surgeon, on January 26, 1994. Prior to evaluating the plaintiff Dr. Fishbein reviewed all records from Dr. Abbey, Dr. Naslund, and Dr. Johnson. Dr. Fishbein also took a personal history from the plaintiff. In his objective findings Dr. Fishbein noted that plaintiff had limited range of motion to the third, fourth, and fifth fingers and lacked three inches of fist closure using those fingers. Dr. Fishbein also noted that plaintiff's hand was cool to the touch, with obvious swelling and a shiny red appearance. Dr. Fishbein ultimately agreed with the diagnosis of reflex sympathetic dystrophy. He concluded that the constant hitting of the joystick

caused the ulnar artery thrombosis and the resulting RSD. He specifically excluded the pre-existing carpal tunnel problem, the prior broken arm, and plaintiff's operation of a body shop, as sources of the problem. Dr. Fishbein testified that plaintiff had sustained a thirty-five (35%) percent permanent impairment to the right upper extremity. He placed a number of permanent restrictions on plaintiff's ability to work.

Plaintiff testified at trial about the jobs he has performed in the past and his inability to perform those jobs now in light of Dr. Fishbein's restrictions of avoiding hand-intensive activities and not lifting over two pounds. Plaintiff also testified about activities of daily living that he can no longer perform, such as weed eating, changing tires, washing cars, and mopping the floor.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. §50-6-225(e)(2). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991); Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988). We also make an independent assessment of the medical proof when medical testimony is in the form of depositions. Landers v. Firemen's Fund Insurance Company, 775 S.W.2d 355, 356 (Tenn. 1989).

FISHBEIN DEPOSITION

Defendant first alleges that the trial court erred in admitting the deposition testimony of Dr. Richard Fishbein. The basis for the objection is that Dr. Fishbein was an evaluating, not a treating, physician, and that his opinion is based on numerous hearsay statements received from both the plaintiff and from his review of the medical findings of other doctors. This issue is without merit.

T.C.A. §24-7-114 specifically abolishes the distinctions between treating and evaluating physicians and between subjective and objective findings as bases for exclusion of such evidence; these are considerations going to the weight of such expert evidence. Jackson v. Greyhound Lines, Inc., 734 S.W.2d 617, 620 (Tenn. 1987); Haley v. Dyersburg Fabrics, Inc., 729 S.W.2d 665, 667 (Tenn. 1987). In Evans v. Wilson, 776 S.W.2d 939, 942 (Tenn. 1989), the Supreme Court held that in a personal injury case plaintiffs' tests and medical reports may be used by the defendants' non-treating expert physician as bases for the latter's opinion.

Subsequent to Evans, the Tennessee Rules of Evidence were adopted in 1990. Rule 703 specifically provides that experts may, in forming their opinion, rely on any facts or data of a type reasonably relied upon by experts in that field. The underlying facts or data themselves need not be admissible in evidence. The Advisory Commission comment specifically provides that inadmissible hearsay can support an admissible expert opinion.

It is clear that evaluating physicians are now permitted to base their opinions on the medical records of treating physicians and the history taken from the patient, as well as their own examination and evaluation. The trier of fact was fully aware of the bases of Dr. Fishbein's opinions. The court had broad discretion in admitting the testimony of expert witnesses and we find no abuse of that discretion in this case. Ayers v. Rutherford Hospital, 689 S.W.2d 155 (Tenn. App. 1984).

FAILURE TO PERMIT AMENDMENT TO ANSWER

Defendant next contends that the chancellor erred in failing to permit it to amend its answer to assert lack of notice under T.C.A. §50-6-201. This issue also is without merit.

Plaintiff filed his original complaint on September 13, 1993. Defendant filed its initial answer on September 30, 1993. No affirmative defenses were raised in

that answer, although defendant reserved the right “to amend its answer upon receipt of new information discovered during the discovery process or investigation of this claim”. Plaintiff filed a similar motion to amend his complaint on March 4, 1994. The order granting the motion was entered March 14. Defendant filed its answer to the amended complaint on March 18, 1994. No affirmative defenses were raised in that answer. Defendant did not attempt to amend its answer again until June 19, 1995, two days before trial was conducted in this case. The amendment sought by defendant was the assertion of the affirmative defense that plaintiff had failed to give proper notice under T.C.A. §50-6-201. See, e.g., Barker v. Heekin Can Company, 804 S.W.2d 442, 444 (Tenn. 1991).

Because lack of notice was not pled in the initial responsive pleading, the defendant waived that affirmative defense. Tennessee Rules of Civil Procedure 8.03, 12.02, 12.08; Thompson Breeding, Dunn, Cresswell & Sparks v. Bowlin, 765 S.W.2d 743, 744 (Tenn. App. 1987). Additionally, a trial court’s decision allowing or disallowing an amendment to the pleadings will not be reversed except for abuse of discretion. Liberty Mutual Insurance Company v. Taylor, 590 S.W.2d 920, 921 (Tenn. 1979). On the facts of this case, no such abuse of discretion has been shown.

There is another reason why this issue has no merit on appeal. Notwithstanding the court’s evidentiary ruling at the beginning of trial, the chancellor nonetheless allowed witnesses to be presented on the notice issue. During the course of trial the chancellor stated that he would not be able to disregard that evidence. At the conclusion of the case the court reversed its earlier ruling, admitted all the evidence, and specifically found that adequate notice was given in this case.

In order to receive worker's compensation benefits, T.C.A. §50-6-201 requires an employee to give notice of an injury to the employer within thirty (30) days after sustaining the injury. Notice must be calculated reasonably to convey the message that the employee has suffered an injury arising out of and in the course of employment. Jones v. Helena Truck Lines, 833 S.W.2d 62 (Tenn. 1992). Plaintiff contends that he gave adequate notice of a work related accident within the statutory period. His ex-wife testified that she called James White while defendant was at Vanderbilt Hospital. At that time plaintiff was not certain whether the injury was work-related. Within thirty (30) days of the date when plaintiff became convinced that his problems were work-related, he filed a written report. The evidence does not preponderate against the trial court's ruling on the merits on this issue.

EXCLUSION OF QUESTIONS ABOUT PLAINTIFF'S DRUG USE

During trial defense counsel attempted to cross examine plaintiff about whether he had a drug problem. The trial court sustained plaintiff's counsel's objection and excluded this testimony. Defendant concedes that the scope of cross-examination rests largely within the discretion of the trial court. E.g., State v. Richardson, 875 S.W.2d 671, 675 (Tenn. Crim. App. 1993). Defendant's only statement about relevancy is found on pages 30-31 of its brief, where counsel asserts "Drug use as it related to employment goes to the heart of a workers' compensation case and cross-examination therein should be allowed and particularly so in this case as Dr. Johnson testified drug use was a possible cause of Mr. Cockrill's problem". This statement is not sufficient to warrant admissibility.

First, there is no proof in the record that suggests the injury itself was caused in any way by the use of any drugs. None of the medical records reflect such a causal relationship. Dr. Johnson's comment about drug use as a possible cause of the problem in question must be read in context. His exact response was as follows:

Q. And, doctor, assuming a set of facts that this man is a significant drug user, does that have any play into this thing one way or the other?

A. There are some drugs which are known to cause vasal constriction of the arteries. It's a possibility.

I think the issue of trauma or injury is more likely.

The trial court did not abuse its discretion in excluding cross-examination about plaintiff's drug use.

EXCLUSION OF PRIVATE INVESTIGATOR TESTIMONY

The chancellor held that a private investigator employed by defendant could not testify because his name had not been disclosed in the interrogatories submitted. The court also excluded as substantive evidence a videotape taken by the investigator which purported to show plaintiff's physical activities. Defendant asserts this failure as error, but has not cited any authority for its position.

The relevant discovery requests, and defendant's responses, are as follows:

2. Please fully identify all persons who have knowledge of Plaintiff's physical condition, activities and limitations before and after the injury or injuries complained of in this suit, together with a narrative as to what each person can testify.

ANSWER

See number 1. [None known at this time other than the physicians who may have treated Plaintiff].

3. Please indicate in detail, all facts and circumstances which are the basis for the defenses that you intend to use against Plaintiff in this matter and please set out a complete, detailed explanation of the basis for said defenses.

ANSWER

Defendant's investigation is incomplete but at this time defendant has no belief that plaintiff was injured on the job.

Defendant never updated those interrogatory responses. In Pettus v. Hurst, 882

S.W.2d 783, 787 (Tenn. App. 1993), the Court of Appeals held that Tennessee Rule of Civil Procedure 26.02(1) permits parties to discover the identity of all persons having relevant knowledge of any discoverable matter, including facts relevant to any claim or defense involved in the litigation. The issue in that case, as in this case, is not the identity of persons who were going to be called as witnesses, but rather the identity of any person who has knowledge of the facts relevant to claims or defenses. Defendant was required upon proper request to produce the name of the private investigator and to disclose the investigator's videotape. The trial court did not abuse its discretion in excluding the testimony of this witness. Id.

Further, defendant cannot claim prejudice because it was able to present the videotape for impeachment purposes during plaintiff's testimony. Defendant's counsel then cross-examined plaintiff about the contents of the video. The chancellor himself questioned plaintiff about some of the scenes.

This issue is without merit.

INCLUSION OF DEFENSE WITNESSES

Plaintiff claims that the trial court abused its discretion in permitting Carol Gann, Charles Hayes, and Blake Silkwood, all employees of defendant, to testify at trial when their names were not provided to plaintiff during discovery. The court initially held that the witnesses would be excluded and that only an offer of proof would be allowed for record purposes. The trial court later reversed itself and considered the testimony of these witnesses as substantive evidence on the issues of notice and causation.

When a witness' name is not revealed during discovery, the trial court has discretion about how to proceed. Id. A judge may permit the testimony, or may exclude the testimony, or may grant a continuance to allow preparation. Airline Construction, Inc. v. Barr, 801 S.W.2d 247 (Tenn. App. 1990). In making its

decision the court may consider the explanation given for the failure to name the witness, the importance of the testimony, the need for time to prepare, and the possibility of a continuance. Pettus v. Hurst, 882 S.W. 783, 787 (Tenn. App. 1993); Strickland v. Strickland, 618 S.W.2d 496 (Tenn. App. 1981).

All of the persons in question were known to plaintiff personally, and played obvious roles in the events presented to the court. Unlike the issue of the private investigator, plaintiff had to know that these persons might testify in contradiction to certain fact statements he made at trial.

As noted above, the trial court ultimately ruled in plaintiff's favor as to both notice and causation. This court has now agreed. We cannot say the trial court abused its discretion in this case. This issue is without merit.

EXTENT OF INJURY

After addressing all the evidentiary questions in this case, defendant appeals the court's ultimate determination that plaintiff did sustain a permanent impairment as a result of a work-related injury.

The party claiming the benefits of the Workers' Compensation Act has the burden of proof to establish his claim by a preponderance of all the evidence. Parker v. Ryder Truck Lines, Inc., 591 S.W.2d 755 (Tenn. 1979). An award may not be based on conjecture; it must be based on material evidence. Testimony of witnesses is evaluated on the basis of reasonableness and unreasonableness of the testimony given, the interest, bias, prejudice or lack thereof on the part of the witnesses, their general credibility, their opportunity to see and observe, and all of the other standards and criteria applicable to factual decisions in a nonjury civil matter. Id. If the claim is for permanent disability benefits, permanency must be proved. In all but the most obvious cases, permanency may only be established

through expert testimony. Thomas v. Aetna Life and Casualty Insurance Company, 812 S.W.2d 278 (Tenn. 1991).

Substantial evidence was introduced at trial about plaintiff's poor work history, his lengthy history of filing worker's compensation claims, and his criminal background, including drug convictions. At the time of trial he was a resident of the Jackson County Jail. The court considered carefully all the proof relevant to plaintiff's credibility, or lack thereof. This court must give great deference to the trial court's findings about the evidence it heard in person. Landers v. Fireman's Fund Insurance Company, 775 S.W.2d 355 (Tenn. 1989). Similarly, the court carefully considered the somewhat contradictory or uncertain testimony from the medical experts about causation in this case. While this court performs an independent evaluation of that testimony given by deposition, we cannot say after careful review that the evidence of either kind preponderates against the findings of the trial judge.

The judgment of the trial court is affirmed. Costs are taxed to defendant-appellant.

CORNELIA A. CLARK, SPECIAL JUDGE

CONCUR:

FRANK F. DROWOTA, III, JUSTICE

JOE C. LOSER, JR., SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

November 14, 1996

Cecil W. Crowson
Appellate Court Clerk

FRANK COCKRILL,	}	SMITH CHANCERY
	}	No. 5523 Below
Plaintiff/Appellee	}	
	}	Hon. C. K. Smith,
vs.	}	Chancellor
	}	
JERSEY MINIERE ZINE, INC.	}	No. 01S01-9601-CH-00007
	}	
Defendant/Appellant	}	AFFIRMED.

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Defendant/Appellant and Surety for which execution may issue if necessary.

IT IS SO ORDERED on November 14, 1996.

PER CURIAM